

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

- B Upon termination, the Consultant will be compensated for services performed prior to termination. Payment for partially completed lump sum items, or any phase of the Scope of Work, will be in the proportion that the partially completed work, or the phase of work, is to the total lump sum item, or total phase of work, as the case may be, less all previous payments. To the extent not paid for as provided above, the City will pay the Consultant an amount covering all direct costs associated with the deleted work actually incurred and for reasonable profit for services or other work performed up to the effective date of the termination and reasonable incidental close-out costs. Payment for any partially completed work, including direct costs associated therewith, will not exceed one hundred percent (100%) of the original Maximum Contract Sum as modified by any change orders, prorated for that portion of the Agreement. No claim for damages of any kind or for loss of anticipated profits on deleted or uncompleted work will be allowed because of the termination.

9.05 CONSULTANT'S RIGHT TO TERMINATE AGREEMENT

If the work under this Agreement is stopped, suspended, delayed or terminated for a period of thirty (30) consecutive calendar days through no act or fault of the Consultant or its consultants or subconsultants, or their agents or employees; or if the City has failed substantially to perform in accordance with the terms and conditions of this Agreement through no act or fault of the Consultant, then the Consultant may upon seven (7) additional calendar days written notice to the City terminate this Agreement and recover from the City payment for all services performed prior to such notice, together with reasonable profit and damages, but not exceeding 100% of the Maximum Contract Sum as modified by any Change Order.

9.06 OWNERSHIP OF DOCUMENTS

- A All materials, information, products, work, documents, studies, surveys, drawings, maps, plans, specifications, reports or other data or material, whether finished, unfinished or draft, developed, prepared, completed or acquired by the Consultant for the Work under this Agreement, including, without limitation, the original data, studies, surveys, reports, correspondence, memoranda, maps, models, photographs, drawings and audio or video recordings, but excluding proprietary management systems utilized by the Consultant, shall become the property of City and shall be delivered to the City upon completion or termination of this Agreement under any provision of this Article 9.00, whichever occurs first. Consultant may make and retain copies of all materials at Project expense.
- B. The Consultant shall not be liable for damages, claims or losses arising out of any reuse of any management methods or procedures, materials, information, products, work, documents, studies, surveys, drawings, maps, plans, specifications, reports

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or other data or material as specified herein on this Project or on any other project subsequent to completion or termination.

- C. Upon termination of this Agreement and payment of fees outstanding, all finished or unfinished materials, products, work, documents, studies, surveys, drawings, maps, plans, specifications, reports or other data prepared by or for the Consultant for the work under this Agreement shall be submitted to the City.

ARTICLE 10.00 - MISCELLANEOUS PROVISIONS

10.01 OTHER CONTRACTS

The City may undertake or award other contracts for additional work related to the Project. The Consultant shall fully cooperate with such other consultants or contractors and with the City's employees and shall carefully adapt scheduling and performing the work under this Agreement to accommodate such other work. The Consultant shall not commit and shall use its reasonable efforts not to permit any act that interferes with the performance of such work by other contractors or the City's employees.

10.02 INDEPENDENT CONTRACTOR

The Consultant represents that it is fully experienced and properly qualified to perform the class of work provided for herein, and that it is properly equipped, organized and financed to perform such work. The Consultant shall maintain complete control over its employees and all of its subconsultants and shall assume responsibility for acts or omissions of its consultants or subconsultants and of persons either directly or indirectly employed by them, as it is for the acts or omissions of persons directly employed by the Consultant. Nothing contained in this Agreement shall create any contractual relation between the City and any consultant or subconsultant of the Consultant or create any obligation on the part of the City to pay or to see to the payment of any sums to any consultant or subconsultant of the Consultant. The Consultant shall perform all work under this Agreement in accordance with its own methods subject to compliance with the terms and conditions of this Agreement.

Consultant is and shall be an independent contractor and not an agent of the City hereunder. However, the Consultant is expected to work closely with City staff to meet all project requirements and the overall schedule and work. The express or implied direction by City of anything in connection with, or pursuant to, this Contract, shall not waive any responsibility of Consultant set out in Article 2.00, nor waive any rights or remedies of City, nor be a defense of any negligent action or omission of Consultant herein.

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10.03 ASSUMPTION OF RISK

Any work undertaken by the Consultant under this Agreement which requires prior review and approval by the City shall be at the sole risk and expense of the Consultant if such prior review and approval by the City is not obtained.

10.04 STANDARDS OF PROFESSION

The Consultant shall perform the work under this Agreement in a manner consistent with that level of care and skill ordinarily exercised by other Consultants currently practicing in the same locality of the Consultant and under similar conditions and circumstances.

10.05 NOTICES

Any notice to be given under this Agreement shall be deemed to have been given when received by the party to whom it is directed by personal service, hand delivery, telecopy (facsimile), or by enclosing the same in a sealed envelope, postage prepaid, and depositing the same in the United States Postal Service, registered, return receipt requested, addressed to City at its address stated herein, or to Consultant at its address stated herein, as the case may be.

City:

Richard E. Wilken
Deputy Director
Communications & Electrical Division
1220 Camino Centro
San Diego, CA 92102-1801
(619) 525-8650 Voice
(619) 525-8693 Facsimile

Consultant:

John B. Richards
Keller and Heckman
1001 G. Street
Washington, D.C. 20001
(202) 434-4100 Voice
(202) 434-4653 Facsimile

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10.06 WAIVER OF BREACH

- A. Waiver of the right to pursue any remedies for breach of any obligation or condition hereunder shall not be deemed to be a waiver of the right to pursue any remedy for any other breach or breaches including, but not limited to, subsequent breaches of the same obligation or condition.
- B. The rights and remedies of the City and the Consultant as provided in any provision of this Agreement are in addition to any other rights and remedies provided by law or under any other provision of this Agreement.
- C. City review, approval, acceptance or payment for any of the Consultant's services under this Agreement shall not be construed to operate as a waiver of any rights of the City under this Agreement or of any cause of action arising out of the performance of this Agreement, and the Consultant shall be and remain liable in accordance with the terms of this Agreement and applicable law for all damages to City caused by the Consultant's performance or failures to perform under this Agreement.

10.07 THIRD PARTY EXCLUSION

This Agreement shall not create any rights or benefits or create a contractual relationship with or a cause of action in favor of a third party against the City or the Consultant, except such other rights, benefits or contractual relationships as may be specifically called for herein.

10.08 SUCCESSORS AND ASSIGNEES

The City and the Consultant, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. Neither the City nor the Consultant shall assign, transfer, convey or otherwise dispose of this Agreement or its interest in or to the same, or any part thereof, without the prior written consent of the other party, nor shall the Consultant assign any moneys due or to become due without the prior written consent of the City, except to a financial institution authorized to do business in the state of California.

10.09 CITY'S RIGHT TO AUDIT

The Consultant shall maintain, and the City shall have access to and the right to examine, at the City's cost, any directly pertinent estimates, documents, papers, payroll records, employee time sheets, expense vouchers and any other records of the Consultant and its consultants and subconsultants involving transactions relating to the Agreement, and to

2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

make excerpts, copies and transcriptions, at the City's cost, for the purpose of verifying the Consultant's claims for services and expenses pertaining to this Agreement for up to three (3) years after termination or expiration of this Agreement. Any audit conducted by the City will not unreasonably interfere with the Consultant's work. In the event a discrepancy in excess of 5% is determined to exist, following the City's exercise of its right to audit, the costs of the audit shall be paid by Consultant.

10.10 COVENANT

The Consultant covenants that it presently has no interest and that it will not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of work required to be performed under this Agreement. Consultant further covenants, to its reasonable knowledge and ability, that in the performance of said work, no person, consultant or subconsultant having any such interest shall be employed or contracted with for services.

10.11 GOVERNING LAW

This Agreement shall be construed in accordance with, and governed by, the laws of the state of California. Venue shall lie in San Diego, California Superior Court.

10.12 SEVERABILITY

If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, all other terms, provisions, covenants and conditions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

In the event that any portion or all of this Agreement is held to be void or unenforceable, the parties agree to negotiate in good faith to reach an equitable agreement which shall effect the intent of the parties as set forth in this Agreement.

10.13 TITLES

The titles or captions set forth in this Agreement are for general reference and convenience only, do not in any way limit or amplify the terms and provisions hereof, and shall have no effect on its interpretation.

10.14 SCOPE OF AGREEMENT

This is the final, complete and entire agreement between the City and the Consultant and it supersedes any and all prior or contemporaneous negotiations, agreements, communications or representations between the parties, either oral or in writing, relating

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to the subject matter of this Agreement, except as expressed herein. This Agreement may be amended at any time and from time to time but only by written instrument signed by both the City and the Consultant.

10.15 CERTIFICATION

The individuals who have affixed their signatures below certify and attest which is empowered to execute this Agreement and act on behalf of and bind the party in whose name this Agreement is executed.

10.16 NOTICE TO PROCEED

The parties to this Agreement understand and agree that execution of this Agreement by the City is not a Notice to Proceed on the Scope of Work of this Agreement. A Notice To Proceed will be given by the City to the Consultant after receipt and approval of all insurance requirements specified in this Agreement or equivalent predictions.

10.17 FEDERAL, STATE AND LOCAL REGULATIONS

Consultant agrees to comply with Title VII of the Civil Rights Act of 1964 (as amended), the California Fair Employment Practices Act, and such other Federal, State laws and local regulations as may apply. Failure to comply with these laws and regulations may result in termination of this Agreement and preclude any future work for the City for a period of one to two years.

10.18 ATTORNEY'S FEES

In the event that suit is brought upon this Agreement to enforce the terms hereof, the prevailing party shall be entitled to a reasonable sum as attorney's fees.

ARTICLE 11.00 - REMEDIES

11.01 GENERAL

City's exclusive remedies with respect to the Services, whether in contract or otherwise, shall be limited to those expressly set forth herein, regardless of fault, negligence or strict liability. Consultant shall in no event be responsible for nor held liable for consequential damages including, without limitation, liability for loss of the Project, loss of profit or business interruption, unless such damage is the result of the acts, omissions or negligence of the Consultant, and City hereby releases, indemnifies, and agrees to hold Consultant harmless from any claims, liabilities and causes of actions, including attorneys' fees, arising from City's use of the project, or any part thereof.

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ARTICLE 12.00 - INTERPRETATION

12.01 CHOICE OF LAW

This Agreement shall be governed by and interpreted in accordance with the laws of the state of California. Unless otherwise specifically stated to the contrary, indemnities against, releases from, assumption of and limitations on liability expressed in this Agreement, as well as waivers of subrogation rights, shall apply even in the event of the fault, negligence, or strict liability is limited or assumed, or against whom rights of subrogation are waived, and shall extend to the officers, directors, employees, agent and related entities of such parties.

ARTICLE 13.00 - COMPLETE AGREEMENT

13.01 GENERAL

This Agreement contains the entire agreement between the parties and supersedes all agreements or representations made prior to the date of execution of this Agreement regarding the subject matter of this Agreement. There is no other written or oral understanding between the parties. No modification, amendment or alteration of this Agreement shall be valid unless it is in writing and signed by the parties hereto.

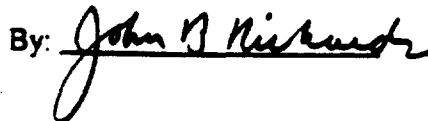
2 GHz MICROWAVE RELOCATION CONSULTANT AGREEMENT

IN WITNESS THEREOF, this Agreement is executed by City, authorizing such execution, and by Consultant.

City of San Diego, CA

Keller and Heckman

By: 

By: 

George Loveland
Name

John B. Richards
Name

General Services Director
for City Manager

Partner
Title

5.18.95

Date Signed

May 1, 1995

Date Signed

Approved as to form and legality:

John W. Witt, City Attorney

By: _____

Approved as to form and legality

this 17th day of May 1995

JOHN W. WITT, City Attorney

By: 
Deputy City Attorney

EXHIBIT C



Phone (202) 331-9491
Fax (202) 331-7639

November 21, 1994

IMPORTANT INFORMATION FOR ALL 2 GHz LICENSEES

Big Money and Your 2 GHz Microwave Band Relocation

Dear 2 GHz Licensees:

The Federal Communications Commission (FCC) has received 74 applications to participate in an auction, beginning December 5, 1994, of 99 Major Trading Area licenses to provide Personal Communications Services in the 2 GHz band (broadband PCS) on frequency Blocks A and B.

As expected, the bidders for the MTA licenses include some of the largest telecommunications companies in the United States. Among those submitting applications were:

- Associated Vencap (Associated Communications)
- AT&T Wireless PCS Inc.
- Continental Cablevision, Inc.
- Radiofone Nation-wide Paging Services, Inc.
- American Portable Telecommunications, Inc.
- WirelessCo, Limited Partnership (Consortium of Sprint, Comcast, Cox Communications and Telecommunications, Inc.)
- GTB Macro Communications Corporation
- PCS Princeco Limited Partnership (Consortium of Nynex, Bell Atlantic, US West and Air Touch)
- BellSouth Personal Communications, Inc.
- Comcast Telephony Services II, Inc.
- Cox Cable Communications, Inc.
- Pacific Telelink Mobile Systems
- Southwestern Bell Mobile Systems, Inc.

I also wanted you to realize that 74 PCS providers:

- ☒ Are investing "big" money.
- ☒ Want their investment to work.
- ☒ May be the proud owners of your 2 GHz microwave license in the very near future.
- ☒ Are in a hurry to enter the market.

AND WHAT HAVE YOU DONE?

- ☐ Will you be ready for the transition?

IMPORTANT INFORMATION FOR ALL 2 GHz LICENSEES

Page 2

These applicants were required to submit their upfront payment for the December 5 auction by Friday, November 18, 1994.

For example, the upfront payment by a PCS provider for the following four Major Trading Areas, consisting of either one or two 30 MHz MTA Frequency blocks, amounted to:

<u>Market No.</u>	<u>Major Trading Area</u>	<u>Population</u>	<u>Upfront Payment</u>	<u>Block(s)</u>
M-1	New York	26,410,547	\$ 15,846,359	B Only
M-3	Chicago	12,069,700	\$ 7,241,820	A & B
M-10	Washington-Baltimore	7,777,875	\$ 4,666,725	B Only
M-34	Kansas City	2,913,304	\$ 1,747,983	A & B

* Upfront Payment = Population x Block Size in MHz x \$0.02

The upfront payment is small compared to the "big money" the successful bidder will have to pay for a PCS license in the December 5, 1994 auction.

Money issues are always interesting and intriguing. Following is an example of the amount of investment which might be made by a PCS provider for the Major Trading Area No. 10, Washington-Baltimore:

<u>Market No.</u>	10
<u>Major Trading Area</u>	Washington-Baltimore
<u>Upfront Payment</u>	\$ 4,666,725

Interest otherwise earned on upfront payment:

8% YEARLY INTEREST RATE OTHERWISE EARNED:	\$ 373,300
8% MONTHLY INTEREST RATE OTHERWISE EARNED:	\$ 31,100

<u>Possible Auction</u>	\$752,000,000
<u>Bidding Price for MTA No. 10</u>	due and payable 5 days after the license has been awarded.

Interest otherwise earned on auction investment:

8% YEARLY INTEREST RATE OTHERWISE EARNED:	\$ 60,160,000
8% MONTHLY INTEREST RATE OTHERWISE EARNED:	\$ 5,000,000

IMPORTANT INFORMATION FOR ALL 2 GHZ LICENSEES

Page 3

Marketing issues are also very interesting. Now that we have learned how the PCS provider who invested in the Washington-Baltimore License Block B could receive, conservatively speaking, a monthly interest of — WOW! — \$5,000,000 on his auction investment, we can determine without a doubt that the PCS provider will be most anxious to enter the PCS market in a hurry to recoup his investment. The PCS provider needs to enter the market the minute he has been issued the 2 GHz license. The PCS provider cannot afford to lose \$5,000,000 per month and more, especially since he will have to spend millions or even billions more to build his network.

NOW THE MOST IMPORTANT QUESTION, YOU THE 2 GHZ LICENSEE SHOULD ASK:

"What have I done to be ready for the transition?"

Over the past several months we have suggested that you plan early. We asked you to address crucial decisions about your relocation, such as:

- Where to go?
- What should the compensation package include?
- What negotiation strategy should I employ?

Are you prepared to accomplish this major transition task alone? If not, UTC Service Corporation and its Transition Team can assist you.

Call us today toll-free at 1-800-900-4682 and find out how we can assist you in relocating from the 2 GHz band.

Sincerely,

Trudy Richmond

Trudy Richmond
Marketing and Sales Manager

Volume IV, Spring/Summer 1995

KELLER AND HECKMAN

LAW OFFICES

Quarterly Update for 2 GHz Incumbents

FCC Announces Commencement of Voluntary Negotiations

by Raymond A. Kowalski

Now that the auctions for Block A and B PCS licenses are closed, the next step toward the creation of PCS systems in the United States is the relocation of point-to-point microwave systems that currently occupy the 2 GHz band earmarked for PCS systems. PCS licensees ultimately can force the microwave incumbents to leave the band by providing them with "comparable facilities." However, before the two sides resort to such involuntary relocation, the Federal Communications Commission (FCC) is hoping that they will be able to come to mutually agreeable terms for early and voluntary microwave system relocation.

On April 18, 1995, the FCC officially announced that the period of voluntary negotiations between microwave incumbents and the winners of the A and B block PCS auctions had begun as of April 5, 1995. Under the FCC's rules, this voluntary negotiation period will run for two years, except for incumbent public safety microwave systems, which will have three years for voluntary negotiations.

Microwave incumbents now are beginning to receive overtures from agents for the PCS auction winners. As the negotiations commence, it is vital for microwave incumbents to understand what is being negotiated during this period. Although the PCS auction winners might indicate otherwise, these negotiations are not about "comparable facilities." Rather, they are about the early and voluntary

departure of the microwave incumbents from the 2 GHz band.

The issue of "comparable facilities" has almost nothing to do with this phase of the negotiations. The requirement for the PCS licensees to provide the microwave incumbents with "comparable facilities" comes into play only when an incumbent microwave licensee is being "involuntarily" relocated under the FCC's "mandatory" relocation rules. Involuntary relocation, however, may not be reached for three to five years.

Keller and Heckman is counselling its clients that this initial voluntary negotia-

tion period is not about engineering or "comparable facilities." It is about the marketplace.

The FCC's mandatory relocation rules preserve the microwave incumbents' rights, but there is no magic formula to accomplish that goal. During the voluntary relocation period, microwave incumbents are free to negotiate whatever terms and conditions they believe are appropriate under the circumstances.

The questions and answers on page 3 may help incumbent microwave licensees understand the nature of the voluntary negotiation period. ♦

Keller and Heckman
Takes on PCIA

Ten days after the FCC announced that the voluntary negotiation period had begun, PCIA, the trade association for the PCS industry, wrote a letter to FCC Chairman Hundt, seeking to change the ground rules.

PCIA denied the possibility that incumbent microwave licensees might try to extract "excessive payments" from PCS auction winners during the voluntary negotiations. Therefore, it asked the Chairman to eliminate the voluntary negotiation period, cap the allowable compensation and do away with the microwave licensee's right to restoration of its 2 GHz system if its replacement system turns out to be inadequate.

Learning of this letter, Keller and Heckman wrote to Chairman Hundt, defending the incumbents' rights to negotiate the best terms possible for their early and voluntary departure from the 2 GHz band.

This attempt to intimidate microwave incumbents and to contaminate the negotiation process is ample evidence of the tactics that will be employed against unwary microwave licensees.

More 2 GHz Relocations

FCC Proposes Reallocation of Spectrum for Mobile Satellite Service

by John Reardon

Despite previous indications that use of the bands in the 2 GHz range would not be changed for the foreseeable future, the Federal Communications Commission (FCC) has adopted a Notice of Proposed Rule Making in ET Docket 93-18 (Notice) that looks toward realigning the bands 1990-2025 MHz and 2165-2200 MHz for use by the Mobile Satellite Service (MSS).

Incumbent licensees currently operate a significant number of stations in these bands. Like the incumbent licensees who must move in order to make room for Personal Communications Services (PCS), these licensees also will be required to relocate their facilities if the FCC's proposal becomes final.

The 1990-2025 MHz band is part of a band that is currently allocated for the Broadcast Auxiliary Service (BAS). The FCC proposes to relocate BAS incumbents to the band 2110-2145 MHz and to force MSS licensees to pay the costs of this relocation.

The 2110-2145 MHz band, however, is currently used by common carrier fixed microwave services and private operational-fixed microwave services. In its Notice, the FCC stated that it believes that sharing between BAS and these fixed microwave services is not feasible. Therefore, before the BAS licensees can be moved into this band, the incumbent fixed microwave service licensees must be moved out.

Like the 2110-2145 MHz band, the 2165-2200 MHz band also is currently used by common carrier and private operational-fixed microwave services. They also must be moved before the band can be used by MSS providers.

The MSS providers would be required to pay the incumbents' relocation expenses, build new facilities for the incumbents, and demonstrate that these new facilities are "comparable" to the incumbents' former facilities. The new facilities would be built and tested by the MSS provider before relocation would occur. Should the new facilities prove within one year not to be equivalent in every respect to the former facilities, the MSS provider would have to pay to return the incumbent to its former facilities until full equivalency is attained.

Note that MSS providers would be forced to finance the relocations of both incumbent BAS licensees and fixed microwave licensees. The Notice is not clear on the time frame, but sources at the FCC indicate that there would be a three

year negotiation period similar to that provided licensees in the band 1850-1990 MHz.

In a footnote, the FCC proposed to eliminate primary licensee status after January 1, 1997, for licensees in the Private Operational-Fixed Microwave Service that are notified of a request for mandatory relocation. This is a significant departure from the policy that now governs the relocation of microwave incumbents to make room for PCS. These licensees will not lose their primary status until their comparable facilities have been built and tested.

The FCC proposes to award the new MSS licensees through competitive auctions, utilizing simultaneous multiple round bidding. ♦

For further information contact the editor:

Raymond A. Kowalski, Law Offices of Keller and Heckman, Washington Center, Suite 500 West, 1001 G Street, N.W., Washington, D.C. 20001, Tel. (202) 434-4230, Fax (202) 434-4646. (This newsletter may be copied or quoted, so long as proper attribution is given. Articles are on topics of general interest and do not constitute legal advice for particularized facts.)

KELLER AND HECKMAN PRACTICE AREAS:

ANTITRUST ♦ ENVIRONMENTAL ♦ FOOD AND DRUG ♦ LITIGATION
TELECOMMUNICATIONS ♦ OCCUPATIONAL SAFETY AND HEALTH
LABOR AND EMPLOYMENT ♦ TRADE ASSOCIATIONS
TRANSPORTATION ♦ GENERAL CORPORATE AND BUSINESS
INTERNATIONAL TRADE

Understanding Voluntary Negotiations

- Q.** If "comparable facilities" are not being negotiated during this voluntary negotiation period, what is?
- A.** Among other things, the price for the incumbent's early and voluntary departure from the 2 GHz band.
- Q.** Do I have to negotiate with the agent of the PCS auction winner if I am contacted?
- A.** No. Negotiations are not required during the voluntary negotiation period. A mandatory negotiation period will follow the voluntary negotiation period.
- Q.** If I choose to negotiate, do I still have the right to comparable facilities?
- A.** Comparable facilities is your worst-case scenario. Even if you are eventually relocated involuntarily, you are always entitled to comparable facilities. If you relocate voluntarily, you are entitled to anything that is mutually agreeable.
- Q.** Does that include upgraded, digital facilities?
- A.** It can include upgraded, digital facilities, dedicated wire-line facilities, fiber-optic facilities, or no facilities, that is, a cash payment — whatever you both agree to.
- Q.** Why would a PCS licensee agree to give us more than "comparable facilities" when they don't have to?
- A.** Some PCS licensees, especially those in major markets, may be willing to give you an incentive in return for your agreement to vacate the 2 GHz band early.
- Q.** Can I demand to be relocated early?
- A.** No. The PCS auction winner is in control of the timing of the negotiations. In fact, PCS auction winners may never initiate negotiations if they believe that their systems can be engineered in such a way as to not cause interference to your microwave system. However, they would be required to send you "prior coordination notices" if they are going to try to engineer around your microwave system.
- Q.** If we don't agree to relocate early, don't we risk the unavailability of microwave channels in the 6 GHz band to accommodate our new system?
- A.** Yes, but it is not your problem; it is the PCS licensee's problem. The PCS licensee will always have the burden to provide you with comparable facilities if you are required to relocate. If they cannot do so, you do not have to move. You cannot be accused of failing to bargain in good faith if you do not negotiate during the voluntary period.
- Q.** If we strike a deal for early and voluntary departure from the 2 GHz band, do we still have the right to be relocated back to the 2 GHz band within a year if our new system is not satisfactory?
- A.** Not necessarily. The right to be relocated back to the 2 GHz band applies only to an involuntary relocation. In the voluntary negotiations, you do not have the right to be relocated back to the 2 GHz band unless you negotiate it.
- Q.** So giving up the relocation right is another reason why the PCS licensee might be willing to give us more than "comparable facilities?"
- A.** Precisely.

"...this initial voluntary negotiation period is not about engineering or 'comparable facilities.' It is about the marketplace."

- Lead Story

Common Sense Last Minute Tax Measures

2 GHz Microwave Incumbents Could Benefit From Tax Break

by Tamara Y. Davis

As part of a package of last minute tax measures, Congress has authorized the Federal Communications Commission (FCC) to issue Tax Certificates to 2 GHz microwave incumbent licensees who enter into voluntary negotiations for the relocation of their microwave facilities. The authority for issuance of Tax Certificates to 2 GHz microwave incumbents is now contained in Section 1033 of the Tax Code.

This action permits tax-free treatment for transactions between PCS licensees and incumbent microwave operators who voluntarily move from the 2 GHz band. Since relocation to different frequency bands (or other media) is necessary to clear the band for PCS technology,

Congress classified such transactions as " involuntary conversions" within the meaning of Section 1033 of the Tax Code.

Section 1033 permits a taxpayer to defer any gain on property sold or exchanged as a result of an involuntary conversion. To defer the gain, the transaction between a microwave incumbent and an A or B Block PCS licensee winner must occur before March 13, 1998. The taxpayer must: (1) reinvest the proceeds of the transaction in property which is similar to or related in service or use to the property which was converted; (2) obtain a certificate from the FCC, clearly identifying the property, and showing that the transaction was necessary or appropriate to

effectuate the FCC's microwave relocation policy; and (3) file a statement showing this tax treatment in the year the sale or exchange occurred. The election must be filed at the time of the sale and cannot be filed as part of an amended return.

Depending on the age of a company's 2 GHz microwave facilities and its treatment of depreciable property, its 2 GHz facilities may already be fully depreciated. Without this relief, any value received for the system would be treated and taxed as a capital gain. ♦

TELECOMMUNICATIONS

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